In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1036

ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY, AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The Commissioner of Internal Revenue believes that the decision of the Circuit Court of Appeals is correct but acquiesces in the petition for certiorari.

The Circuit Court of Appeals was unanimous as to the result although not as to the reasons which impelled it (R. 114–122), Judges Frank and L. Hand writing separate opinions and Judge Chase concurring in the decision without indicating his individual views. Judge Frank believed

that, under *Helvering v. Grinnell*, 294 U. S. 153, the failure of the beneficiaries to renounce the appointment was the decisive factor, and that comparison of the interests taken under the appointment with the interests which would have been taken in default of appointment was therefore unnecessary. Judge L. Hand rejected the failure to renounce as controlling and believed the decisive factor to be that the interests of the beneficiaries under the appointment were materially different from what they would have been in default of appointment.

We believe that each of the alternative grounds stated in these opinions adequately supports the decision reached. It is our position, first, that the exercise of a general power of appointment, coupled with a failure to renounce on the part of the beneficiaries, requires, without more, the inclusion of the appointed property within the gross estate of the donee of the power, under Section 302 (f) of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended. It was the fact that the beneficiaries did renounce which appears to have been decisive in the *Grinnell* case, particularly when read in the light of *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, 65. But if failure to renounce does not suffice in all circumstances, it then becomes necessary to compare the interests appointed with the interests which would otherwise have been taken. Where, as here, the exercise of the power

is effective to disturb the flow of benefits, the case necessarily falls within the statute. Even were it true, as cannot be established in the present case, that for certain purposes state property law treats the interests as having vested under the will of the donor of the power, and treats the exercise of the power as merely carving lesser interests out of the former, this would be immaterial. The operation of Section 302 (f) does not turn on such technicalities of local law. See *Morgan* v. *Commissioner*, 309 U. S. 78. Nothing in the *Grinnell* case establishes the contrary.

The taxpayer urges, to the opposite effect (Br. 13–16), that the law of New York does control, and requires a decision in its favor. Under this view, it is not plain that the decision below is in conflict with *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 F. 2d 758 (C. C. A. 3d), or *Legg's Estate* v. *Commissioner*, 114 F. 2d 760 (C. C. A. 4th), since the estates involved in these cases were controlled by the law of Pennsylvania rather than of New York. We think, however, that the foregoing decisions are broadly in conflict with the decision below.

Section 403 of the Revenue Act of 1942, c. 619, 56 Stat. 957, has prospectively amended the Internal Revenue Code so as to make decisive the possession of a power of appointment rather than its exercise. There are, however, several other cases now in litigation arising prior to the 1942

amendment which involve the same point as the instant case, and we are informed that there are many more such cases pending in the Bureau of Internal Revenue. The amounts involved aggregate several millions of dollars.

Accordingly, while we think that the decision below is correct, the existence of a substantial conflict and the importance of the problem make appropriate the granting of a writ of certiorari.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

JUNE 1943.

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